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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

Angel Malave, an individual,	)	Case No. CV-11-7371 R (JEMx)
Plaintiff,	)	
	)	<i>Hon. Manuel L. Real</i>
vs.	)	
	)	PLAINTIFF'S MOTION FOR
DEBT RESOLUTION	)	LEAVE TO FILE SECOND
CENTER, f/k/a	)	AMENDED COMPLAINT
FREEDOM DEBT CENTER, a	)	
California Corporation;	)	Courtroom: 8 (second floor)
NATIONWIDE SUPPORT	)	Date: November 7, 2011 (if
SERVICES, INC., a California	)	necessary)
corporation and Does 1 to 10,	)	Time: 10:00 a.m. (if necessary)
Defendants		

Plaintiff Angel Malave seeks leave to file a second amended complaint (first amendment as to Defendant Nationwide Support services).

This motion is being on shortened time to grant Plaintiff relief from Local Rule 7-3, as there is not time to wait 10 days prior to filing motion or 5 days prior to the last day for filing the motion following the conference of counsel pursuant to L.R. 7-3. The parties did communicate about the

1 subject of this motion, both via email on October 20, 2011 and on  
2 telephone on October 24, 2011.

3 The shortened time also allows this court to hear this motion at the  
4 same time as Defendants' motion to dismiss and Defendants' motion for a  
5 more definite statement.

6 Pursuant to Local Rule 7-15, Angel Malave waives oral argument and  
7 requests that the Court dispense with oral argument on this motion.

8 This motion will be made pursuant to Rule 15 of the Federal Rules of  
9 Civil Procedure because the interests of justice require amendment. This  
10 motion will be based upon this notice of motion, the attached memorandum  
11 of points and authorities, supporting declarations, and exhibits, upon the  
12 pleadings and papers on file in this action, and upon any additional  
13 evidence that the Court may require.

14  
15 I. INTRODUCTION:

16 Plaintiffs' motion for leave to file a second amended complaint seeks  
17 to respond to the Defendants' joint motion for a more definite statement  
18 and motion to dismiss (which addressed three of the four claims in  
19 Plaintiff's first amended complaint.)

20 As the first amended complaint added Defendant Nationwide Support  
21 Services, Inc. ("Nationwide"), this will be the first amendment as to  
22 defendant Nationwide.

23 The first amended complaint was filed by agreement of Plaintiff and  
24 DEBT RESOLUTION CENTER, f/k/a FREEDOM DEBT CENTER, a  
25 California Corporation ("DRC") and with court order with an agreed  
26 stipulation to file in the state court.

27 This will be the first amendment in Federal Court and the first  
28 amendment as to Defendant Nationwide Support Services. Nationwide

1 Support Services has not filed a responsive pleading in this litigation in  
2 either state or federal court.

3 Good cause exists in that the by the filing of a second amended  
4 complaint will clarify the claims of Plaintiff. Both parties will save time and  
5 speed negotiation by narrowing the claims at issue and omitting the  
6 need of some of Defendant's written and oral discovery.

7  
8 II. STATEMENT OF FACTS

9 Angel Malave filed a complaint in pro se in Los Angeles Superior  
10 Court on August 27, 2010, against Defendant Debt Resolution Center  
11 ("DRC") and former Defendant Noteworld LLC. Defendants, as well as  
12 new Defendant Nationwide, work together to offer "Debt Relief Services" to  
13 consumers.

14 Mr. Malave initially sued DRC and Noteworld for breach of contract,  
15 violations of California's check sellers, bill payers and proraters law,  
16 violations of California's Consumer Legal Remedies' Act, and breach of  
17 fiduciary duty.

18 Angel Malave was targeted by Defendant Debt Resolution Center,  
19 f.k.a. Freedom Debt Center, and received mailers promising he could pay  
20 off his debt in a short time for one monthly low payment. At that time, Mr.  
21 Malave was undergoing testing for possible cancer and his mind was on his  
22 family and how they would fare if he were not only diagnosed as having  
23 cancer, but things progressed for the worst. He saw the program at Debt  
24 Resolution Center as a way to pay off the family's credit card debt faster  
25 and so despite being current with all his credit cards, Mr. Malave joined the  
26 debt settlement program. As he began the program, Mr. Malave was  
27 diagnosed with cancer.

28 As instructed by DRC employee's, Mr. Malave ceased his payments

1 on his credit cards and instead made monthly payments to DRC. The idea  
2 was that Mr. Malave would save money in a trust account held by  
3 Noteworld (since dismissed from this suit) and DRC would make  
4 settlements with the creditors and pay off the debt with money saved in the  
5 trust account. However, the first payments all went towards DRC's fee,  
6 and so when Mr. Malave was sued by his first creditor, little to no money  
7 was saved for settlement.

8 Mr. Malave was given legal advice by the legal division at DRC, who  
9 provided him with forms for requesting arbitration and after Mr. Malave  
10 filled the forms out, he sent them to DRC and received corrections, then  
11 Mr. Malave would file the documents.

12 Before dropping out of the program, in less than one year, Mr. Malave  
13 was sued by four of his six creditors that had been enrolled in the program.  
14 He filed motions to compel arbitration in all, as instructed by non-lawyers at  
15 DRC, and three motions were granted and one denied.

16 None of his credit card debts were settled by DRC; instead, he  
17 defaulted in all and was charged high penalties and late fees, all which  
18 were added to the amounts he owed and compounded with interest rates  
19 which had been increased due to his delinquent status. DRC likes to talk  
20 about how they have returned Mr. Malave's payments, but they cannot  
21 undue the damage they caused.

22 Mr. Malave's case is hardly unique, as studies have shown that the  
23 majority of consumers (numbers vary but over 90%) who join Debt Relief  
24 services end up spending money on fees and getting few or no debts  
25 settled.

26 Because of DRC's advice, Mr. Malave was sued four times, his credit  
27 was destroyed and the stress in his life increased geometrically as he was  
28 undergoing treatments for his cancer.

1           III.    PROCEDURAL HISTORY

2           Angel Malave filed a complaint in pro se in Los Angeles Superior  
3 Court on August 27, 2010, against Defendant Debt Resolution Center and  
4 former Defendant Noteworld LLC. Kleinpeter Dec. ¶3. Defendants, as  
5 well as new Defendant Nationwide, work together to offer “Debt Relief  
6 Services” to consumers. Mr. Malave dismissed Noteworld early in the  
7 litigation, but Debt Resolution Center did answer the complaint.

8           Plaintiff’s counsel, Amy Clark Kleinpeter, substituted into this matter  
9 on or about February 14, 2011. Defendant’s counsel, Steven Krongold,  
10 substituted into this matter on or about July 27, 2011. The parties  
11 stipulated to continue trial at that point. Kleinpeter Dec. ¶4.

12           Following further discovery, Ms. Kleinpeter determined that a  
13 necessary party had been left out – Nationwide. Many of the actions  
14 believed to have been taken by DRC were actually performed by  
15 Nationwide, who also trained all DRC employees.

16           The parties stipulated to allow Plaintiff to file a first amended  
17 complaint, which was filed in Los Angeles Superior Court on August 31,  
18 2011. This complaint named Debt Resolution Center and the new  
19 defendant, Nationwide Support Services. The claims were fraud, violation  
20 of Consumer Legal Remedies Act, violation Of The Electronic Funds  
21 Transfer Act, 15 U.S.C. § 1693 et seq., and negligent Infliction of Emotional  
22 Distress (only one claim in common with initial complaint). Kleinpeter Dec.  
23 ¶5.

24           This action was removed to Federal Court on September 9, 2011.

25           Defendants filed a Motion to dismiss and a Motion for More Definite  
26 Statement on September 27, 2011.

27           Believing that Fed. Code of Civ. Procedure 15A applied, Plaintiff  
28 attempted to file the second amended complaint in advance of the date the

1 opposition to Defendants' motions was due. The court clerk refused to  
 2 accept the filing, and the next day accepted the document with deficiencies  
 3 but not for filing. Misreading a local rule that states that "all" amended  
 4 documents must be electronically filed, Plaintiff's counsel also electronically  
 5 filed the second amended complaint. Kleinpeter Dec. ¶7.

6 The second amended complaint was rejected by this court on  
 7 October 20, 2011. Kleinpeter Dec. ¶10.

8 On October 20, 2011, Plaintiff contacted Defense counsel to see if  
 9 Defendants would stipulate to the filing of the second amended complaint  
 10 and provided Defendant with a copy as it was filed. Defendant did not  
 11 respond to the email or multiple calls to his office, but when Plaintiffs  
 12 counsel contacted him on his cell phone on October 24, she learned that  
 13 Defendants would not stipulate. Kleinpeter Dec. ¶12.

### 14 15 III. LEAVE TO AMEND SHOULD BE GRANTED

#### 16 17 a. Plaintiff's second amended complaint should be allowed under the 18 court's policy of liberal provision of leave to amend

19 "[A] party may amend the party's pleading only by leave of court  
 20 or by written consent of the adverse party; and leave shall be freely given  
 21 when justice so requires." Fed. R. Civ. P. 15(a). "[L]eave to amend 'shall  
 22 be freely given when justice so requires,' Fed.R.Civ.P. 15(a), and this  
 23 policy is to be applied with extreme liberality." *Morongo Band of Mission*  
 24 *Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (two-year delay alone  
 25 insufficient to deny leave to amend).

26 "Ordinarily, courts will defer consideration of challenges to the merits  
 27 of a proposed amended pleading until after leave to amend is granted and  
 28 the amended pleading is filed." *Netbula, LLC v. Distinct Corp.*, 212 F.R.D.

1 534, 539 (N.C. Ca. 2003).

2 "Four factors are commonly used to determine the propriety of a  
3 motion for leave to amend. These are: bad faith, undue delay, prejudice to  
4 the opposing party, and futility of amendment." *Roth v. Garcia Marquez*,  
5 942 F.2d 617, 628 (9th Cir. 1991). These factors do not carry equal weight.

6 The most important factor is whether the amendment will prejudice  
7 the opposing party. *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir.  
8 1973). Here, the claims are unchanged between the first and second  
9 amended complaint and allegations in the second amended complaint are  
10 very similar, they are just more detailed. The second amended complaint  
11 describes the claims more clearly such as was requested in Defendants'  
12 motion for a more definite statement and in response to Defendants' motion  
13 to dismiss. Kleinpeter Decl., ¶ 6 Defendant will suffer no prejudice as a  
14 result of the amendment.

15 The amended complaint is not submitted in bad faith. It is being filed  
16 in response to Defendants' motions and more specifically describes the  
17 fraud claim in particular but also addresses Defendants' concerns with the  
18 CLRA and negligent infliction of emotional distress causes of action.  
19 Kleinpeter Decl., ¶ 8.

20 There has been no undue delay. Plaintiff began work on the  
21 amended complaint after receipt and review of Defendants' motion to  
22 dismiss and motion for a more definite statement. When Plaintiff's  
23 amended complaint was rejected by the court, her counsel contacted  
24 Defendant's counsel on October 16 and 17, but was unable to reach him  
25 and he did not return her messages. She then contacted Defense counsel  
26 via email on October 20, 2011, to request that Defendant stipulate to  
27 amend. The October 20, 2011 email providing Defendant with an outline  
28 on the legal reasoning why amendment should be allowed, the proposed



1 stipulation and proposed amended complaint. Kleinpeter Decl., ¶ 2.

2 Local Rule 7-3 requires Plaintiff to wait 10 days before filing the  
3 motion under Local Rule 7-3 or 5 days prior to last day motion must be  
4 filed. Both would have put the motion date past the date of the unopposed  
5 motion for a more definite statement and motion to strike, so Plaintiff is  
6 proceeding ex parte for an order shortening time – clearly no delay.

7 Finally, the amendment would not be futile. Plaintiff has responded to  
8 the Defendants' concerns on his fraud claim and clearly delineated which  
9 phrases and alleged facts were communicated to him, who made each  
10 communication, when each was made and how he relied on each and how  
11 for each, Defendants had knowledge the communication was false. Plaintiff  
12 as also addressed Defendants concerns on the applicability of the CLRA  
13 claim and added detail to the negligent infliction of emotional distress claim.

14 Additionally, the fourth claim for EFTA violations as to Nationwide,  
15 was not mentioned in Defendants' motion to strike, so allowing Plaintiff to  
16 continue on this claim seems to not be futile.

17  
18 b. Plaintiff should be allowed to file the second amended complaint as a  
19 matter of course under Fed. R. Civ. P. 15(a)

20 Plaintiff's first amendment was with court permission after agreement  
21 by all parties, and therefore did not use the "free" amendment allowed  
22 under Fed. R. Civ. P. 15 (a) "(1) Amending as a Matter of Course. A party  
23 may amend its pleading once as a matter of course within: (B) if the  
24 pleading is one to which a responsive pleading is required, 21 days after  
25 service of a responsive pleading or 21 days after service of a motion under  
26 Rule 12(b), (e), or (f), whichever is earlier."

27 Federal courts have found that Plaintiff was allowed to make use of  
28 the right to amend as a matter of course for a second amended complaint if



1 the first was filed pursuant to court order. See, e.g. *Thompson v. Jiffy Lube*  
 2 *Intern., Inc.*, D.Kan.2007,505 F.Supp.2d 907, "Plaintiffs could file second  
 3 amended complaint as of right, after seeking and receiving court  
 4 permission to file first amended complaint."

5  
 6 c. In the alternative, the court should allow the filing of the second  
 7 amended complaint for Nationwide alone under Fed. R. Civ. P. 15 (a)

8 Also, Defendant Nationwide has never filed a responsive pleading in  
 9 this matter in state or federal court. Under Rule 15(a), courts should grant  
 10 leave to amend as a matter of course until a responsive pleading is filed.  
 11 See, *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9<sup>th</sup>  
 12 Cir.1992) and *Motley v. Parks* (C.D. Cal. 2000) 198 F.R.D. 532, 533.

13 Because Nationwide was not a defendant in the initial complaint, this  
 14 will be the first amendment relating to Nationwide. "If there is more than  
 15 one defendant, and not all have served responsive pleadings, the plaintiff  
 16 may amend the complaint as a matter of course with regard to those  
 17 defendants that have yet to answer." *Boyd v. District of Columbia*,  
 18 D.D.C.2006, 465 F.Supp.2d 1.Federal Civil Procedure).

19 At the very least, Plaintiff has a right to file, without court permission,  
 20 a complaint against Nationwide only.

#### 21 IV. CONCLUSION

22 For all of the foregoing reasons, Angel Malave's ex parte application  
 23 for leave to file an amended complaint should be granted. In the  
 24 alternative, Mr. Malave's ex parte application for an order shortening time  
 25 on the motion for leave to file an amended complaint should be granted.

26 Dated: October 25, 2011 Clark Kleinpeter Law  
 27 By /s/ Amy Clark Kleinpeter  
 28 Amy E. Clark Kleinpeter  
 Attorney for Angel Malave, Plaintiff

1  
2 I, Amy E. Clark Kleinpeter hereby declare as follows:

- 3 1. I am counsel for Angel Malave in this action.
- 4  
5 2. MEET AND CONFER -- On October 16, 2011, Plaintiff's counsel  
6 contacted Defense counsel by telephone, but he stated he was on  
7 the other line and would call her back. On October 17, 2011,  
8 Plaintiffs counsel left a message with Defense counsel's office.  
9 Defense counsel did not return the calls. On October 20, 2011,  
10 Plaintiff contacted Defense counsel via email to see if Defendants  
11 would stipulate to the filing of the second amended complaint and  
12 provided Defendant with a copy of the second amended complaint as  
13 it had been filed, a copy of the proposed stipulation and legal  
14 argument for allowing amendment. Defendant did not respond to the  
15 email or multiple calls to his office, but when Plaintiffs counsel  
16 contacted him on his cell phone on October 24, she learned that  
17 Defendants would not stipulate. (Copy email attached as Exh. A)
- 18 3. Plaintiff filed this action on August 27, 2010. The first amended  
19 complaint was filed on August 31, 2011.
- 20 4. The second amended complaint is being filed in response to  
21 Defendants' motion for a more definite statement and motion to  
22 dismiss, both filed on September 27, 2011 and more specifically  
23 describes the fraud claim in particular but also addresses Defendants'  
24 concerns with the CLRA and negligent infliction of emotional distress  
25 causes of action.
- 26 5. Plaintiff began work on the amended complaint after receipt and  
27 review of Defendants' motion to dismiss and motion for a more  
28 definite statement.
6. The second amended complaint adds no new parties or claims. It  
more specifically describes the fraud claim in particular but also  
addresses Defendants' concerns with the CLRA and negligent  
infliction of emotional distress causes of action.
7. Believing that Fed. Code of Civ. Procedure 15A applied, Plaintiff  
attempted to file the second amended complaint in advance of the

1 date the opposition to Defendants' motions was due. The court clerk  
2 refused to accept the filing, and the next day accepted the document  
3 with deficiencies but not for filing. Misreading a local rule that states  
4 that "all" amended documents must be electronically filed, Plaintiff's  
counsel also electronically filed the second amended complaint.

5 8. The second amended complaint was rejected by this court on  
6 October 20, 2011.

7 9. Plaintiff now moves for leave to file an amended complaint.

8  
9 10. The proposed amended complaint has been submitted  
10 concurrently with this ex parte application and the accompanying  
motion.

11 11. I believe that the claims alleged in the amended complaint are  
12 warranted by the facts and the law.

13 I declare under penalty of perjury that the foregoing is true and  
14 correct.

15 DATED: October 25, 2011

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18 Amy E. Clark Kleinpeter  
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